



Legal Update

May 2019

The Appeals Court holds that even without any evidence of erratic driving, a reasonable jury could conclude that the defendant drove negligently so as to put the lives or safety of the public in danger by having consumed alcohol and driving substantially below the posted speed limit while holding a cell phone one foot from his face.

Commonwealth v. Ismael Teixeira, Mass. Appeals Ct. No. 18-P-658 (2019).

On August 19, 2017, State Trooper Gary Furtado observed a vehicle driving between five and ten miles per hour on a road with a posted speed limit of thirty miles per hour. The driver - the defendant Ismael Teixeira - was holding a cell phone about one foot away from his face and appeared to be reading from the cell phone's screen. After running the license plate, Trooper Furtado discovered that there was no inspection results on the vehicle. Trooper Furtado followed the vehicle for a block and activated his emergency lights. The trooper never observed the vehicle weave, drift, or swerve; nor did it strike any curb or other vehicle.

When Trooper Furtado approached the stopped vehicle, he saw the defendant's cell phone on his lap with the "GPS" function open and he noted that the defendant smelled of alcohol. The defendant's eyes were bloodshot and his speech was slurred and he fumbled when asked to provide his license several times. The defendant offered four contradictory destinations when questioned where he was going that evening.

The defendant claimed he consumed two beers that evening and agreed to perform field sobriety tests. When exiting the vehicle, defendant was unbalanced and swayed back and forth. He was also unable to keep his foot six inches above the ground after eight and then eleven seconds, rather than after thirty seconds as instructed. On the nine-step walk and turn, the defendant had difficulty following instructions, did not touch his heel to his toe on some steps, stepped on his own toes, and took ten steps instead of nine.

The defendant was charged with (1) Operating Under the Influence (OUI), and (2) Negligent Operation. After a trial, the jury acquitted the defendant of OUI and convicted him of Negligent Operation. The defendant appealed and argued there was insufficient evidence to sustain the conviction.

Conclusion: The Appeals Court held that even without any evidence of erratic driving, a reasonable jury could conclude that the defendant drove negligently so as to put the lives or safety of the public in danger by having consumed alcohol and driving substantially below the posted speed limit while holding a cell phone one foot from his face.

In order to prove Negligent Operation, the Commonwealth must prove that the defendant:

- (1) operated a motor vehicle;
- (2) on a public way; and
- (3) negligently, so that the lives or safety of the public might be endangered.

The primary issue in this appeal concerned the third element. The statute only requires proof that the defendant's conduct **might** have endangered the safety of the public, **not that it, in fact, did**. See *Commonwealth v. Duffy*, 62 Mass. App. Ct. 921, 923 (2004).

Unlike many Negligent Operation cases, the facts in this case did not involve a near collision, a swerve, a departure from marked lanes, or any erratic movement of the motor vehicle other than driving at a speed significantly lower than the speed limit. See, e.g., *Commonwealth v. Charland*, 338 Mass. 742, 743-744 (1959) (affirming negligent operation conviction after head-on collision while defendant was traveling wrong way on rotary traffic circle); *Commonwealth v. Ferreira*, 70 Mass. App. Ct. 32, 33-35 (2007) (operating to endanger where, despite no pedestrians nearby, defendant accelerated in manner that caused tires to spin, car to "fishtail," and "screeching noise"); *Commonwealth v. Daley*, 66 Mass. App. Ct. 254, 256 (2006) (affirming negligent operation conviction where erratic swerving while intoxicated such that defendant "nearly struck a large road sign").

A civil infraction alone, such as speeding, is not sufficient evidence to constitute Negligent Operation. See *Duffy*, 62 Mass. App. Ct. at 922 (evidence of speeding alone was insufficient to support negligent operation conviction). However, in *Commonwealth v. Ross*, 92 Mass. App. Ct. 377 (2017), the Appeals Court held that excessive speed at night on a narrow residential road - *after the driver had consumed alcohol* - was sufficient evidence to prove the defendant had operated his vehicle negligently and endangered the public. Similar to the facts at hand, in *Ross* the defendant had been acquitted of OUI, but convicted of Negligent Operation. "The fact that the jury ultimately did not convict the defendant of OUI does not preclude their consideration of the evidence of intoxication in considering the negligent operation charge." *Id.* at 380.

Here, after consuming alcohol, the defendant drove twenty to twenty-five miles per hour below the posted speed limit with his cell phone held one foot in front of his face. A defendant's driving need not have been erratic to support a conviction of negligent operation, so long as the conduct, taken as a whole, might have endangered the lives and safety of the public. See *Commonwealth v. Sousa*, 88 Mass. App. Ct. 47, 51 (2015) ("The question is whether the defendant's driving had the potential to cause danger to the public, not whether it actually did").